

**LAW AND PUBLIC SAFETY**

**DIVISION ON CIVIL RIGHTS**

**Employment Advertising**

**Proposed Readoption with Amendments: N.J.A.C. 13:11**

Authorized By: Craig Sashihara, Director, Division on Civil Rights.

Authority: N.J.S.A. 10:5-6, 10:5-8.g, and 10:5-12.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-021.

Submit comments by: April 4, 2014, to:

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Division on Civil Rights

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The agency proposal follows:

**Summary**

The New Jersey Division on Civil Rights (DCR), in the Department of Law and Public Safety, enforces the New Jersey Law Against Discrimination (LAD), N.J.S.A.

10:5-1 to 49. Pursuant to N.J.S.A. 52:14B-5.1.c(2), DCR's rules concerning Employment Advertising, N.J.A.C. 13:11, are set to expire on June 25, 2014. DCR has reviewed these rules and determined them to be necessary, reasonable, and proper for the purpose for which they were originally promulgated. However, pursuant to its rulemaking authority found at N.J.S.A. 10:5-8, DCR proposes amendments to N.J.A.C. 13:11 to ensure consistency with recent amendments to the LAD and relevant case law, and to delete outdated and redundant provisions.

The LAD makes it unlawful for employers, employment agencies, and labor organizations to print or circulate or cause to be printed or circulated any statement, advertisement, or publication that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, ancestry, nationality, age, sex, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States, unless based upon a bona fide occupational qualification. See N.J.S.A. 10:5-12.a and 10:5-12.c.

The chapter being proposed for readoption addresses these prohibitions and clarifies that newspapers and other publications are prohibited from publishing discriminatory employment advertisements. The New Jersey Supreme Court has held that newspapers and other publications are properly subject to these rules, because they would be aiding and abetting discriminatory employment advertising by publishing discriminatory ads in their publications. See *Passaic Daily News v. Blair*, 63 N.J. 474,

488 (1973); N.J.S.A. 10:5-12.e.

The following is a summary of N.J.A.C. 13:11 and the proposed amendments.

N.J.A.C. 13:11-1.1(a) and (b), 1.4(c) and (d), and 1.5(a) (summarized individually below) all include lists of the characteristics protected by the LAD. DCR proposes to amend each of these subsections to add two protected characteristics that were added to N.J.S.A. 10:5-12.c after the most recent amendments to the chapter: “civil union status” and “gender identity or expression.”

N.J.A.C. 13:11-1.1 sets forth the general rules prohibiting discriminatory employment advertising. Subsection (a) prohibits employers, labor unions, employment agencies, newspapers, or other publications from printing, publishing, or circulating any print, electronic, or other advertisement relating to employment that expresses, either directly or indirectly, any discrimination or preference based on characteristics protected by the LAD. Subsection (b) prohibits the use of any term, phrase, or expression in an advertisement that is meant to attract or deter any person because of a LAD-protected characteristic.

Subsection provides examples of certain phrases regarding equal opportunity that are deemed not to violate the rules.

Other than adding the recently added protected characteristics, DCR proposes no additional amendments to this section.

N.J.A.C. 13:11-1.2 sets forth an exception to the rules for advertising ordered by the DCR Director.

N.J.A.C. 13:11-1.3 addresses the use of gender-neutral job titles in advertisements and prohibits use of any language in advertisements expressing a

limitation or preference based on a LAD-protected characteristic, except where the protected characteristic is a bona fide occupational qualification (BFOQ). The section heading of this rule, “preferences expressed in column heading or body of advertisement,” is intended to show that the employment advertising rules apply to both the heading and body of any advertisement. Because “column heading” may be interpreted to apply only to traditional print publications, DCR proposes to amend the section heading to substitute “category” for “column,” as this is more inclusive of electronic publication formats, and to add “label or job title” to more broadly encompass the designations that may define the scope of employment advertisements.

As subsection (a) is virtually identical to N.J.A.C. 13:11-1.1(a), DCR proposes to amend this subsection by adding new language that more directly addresses the purpose of this subsection: to ensure that limitations or preferences in headings, titles, and categories in publications or advertisements are deemed LAD violations. DCR proposes to substitute language that more clearly and succinctly states that the LAD prohibits discriminatory language in headings, titles, and categories. Subsection (b) is proposed for amendment to clarify that “those provisions” means “N.J.A.C. 13:11-1.4.” DCR proposes deleting subsection (e), because the 2007 amendments to this section made this subsection irrelevant. Subsection (e) refers to “the above partial list,” but that partial list of examples of prohibited titles and permissible substitutes was deleted from subsection (d) in 2007. It appears that it was an oversight to retain subsection (e) when that list was deleted in 2007.

N.J.A.C. 13:11-1.4 defines the scope of a narrow exception to the LAD. This section permits advertisements to solicit applicants of a particular protected

characteristic when that characteristic is a BFOQ for a specific job or employment-related opportunity. In some cases, an employer may be able to show the need for a BFOQ exception where, for example, an employer needs to hire an actor of a particular gender or race for authenticity in a role. DCR proposed a technical amendment to subsection (a) to clarify that “these provisions” means “this chapter.” DCR also proposes to amend paragraph (d)3 to correct a typographical error: instead of “reference,” the sentence was intended to state “[c]ustomer, client, co-worker, or employer preference ...”

DCR also proposes to amend subsection (e) to clarify the circumstances in which a gender-based BFOQ may be applicable for jobs involving intimate personal contact with persons of the opposite sex, consistent with court decisions addressing gender-based BFOQs. This subsection currently states that a gender-based BFOQ exception may be warranted “where the job in question necessarily involves intimate personal contact with persons of the opposite sex.” Relevant court decisions have clarified that the need to perform tasks involving intimate personal contact may not alone be sufficient to warrant a BFOQ. Instead, the employer bears the burden of showing that intimate personal contact with persons of the opposite sex is an essential part of the employee’s job and a central purpose of the employer’s enterprise, that clients, patients, or others served would not consent to service by members of the opposite sex, that the legitimate privacy interests of clients, patients, or others served by the employee outweigh the public interest in equal employment opportunity, and that no reasonable alternatives to a gender-based BFOQ are feasible. See *Spragg v. Shore Care*, 293 N.J. Super. 33, 51-52 (App. Div. 1996); *In the Matter of Juvenile Detention Officer Union County*, 364

*N.J. Super.* 608, 617-618, 622 (App. Div. 2003). Accordingly, the subsection is amended to reflect that, for the BFOQ exception based on the characteristic of sex, the employer is required to demonstrate the standard is met in order to qualify for the exception.

N.J.A.C. 13:11-1.5 sets forth the process by which an employer or publisher may request a ruling from DCR on a request for a BFOQ exception. DCR proposes to amend this section to update the telephone number and address to be used for BFOQ requests. Subsection (e) is proposed for amendment to clarify that “these provisions” means “this chapter.”

N.J.A.C. 13:11-1.6 provides that the failure to comply with this chapter shall be deemed a violation of the LAD.

A 60-day comment period is provided in this notice of proposal and therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the notice is excepted from the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

### **Social Impact**

The rules proposed for readoption with amendments will have a beneficial impact on the residents of New Jersey by clarifying that discriminatory advertising in all forms is prohibited, by deleting provisions that are no longer essential to the regulation of employment advertising, and by making the rules consistent with the requirements of the LAD.

### **Economic Impact**

The rules proposed for readoption with amendments will have no economic

impact on employers, unions, newspapers, or other media that publish employment advertisements, since all legal obligations arising under the rules have been mandated by existing Federal or State law. The rules may assist the regulated entities in complying with the existing legal requirements by clarifying permissible and impermissible conduct, and clarifying procedures.

### **Federal Standards Statement**

A Federal standards analysis is not required because the rules proposed for readoption with amendments are intended to clarify and interpret the New Jersey Law Against Discrimination, and do not exceed Federal standards. Federal law prohibits discriminatory employment advertising based on race, color, religion, sex, disability, age, or national origin. See 42 U.S.C. § 2000e-3(b); 29 U.S.C. § 623(e); 29 CFR 1630.4(a). The rules proposed for readoption with amendments are consistent with the prohibitions against discriminatory employment advertising contained in Federal law. To the extent that the prohibitions against discriminatory advertising based on marital status, domestic partnership status, civil union status, affectional or sexual orientation, gender identity or expression, and liability for service in the U.S. Armed Forces exceed applicable provisions in Federal law, the LAD mandates such provisions.

### **Jobs Impact**

The rules proposed for readoption with amendments will not result in the generation or loss of jobs.

### **Agriculture Industry Impact**

The rules proposed for readoption with amendments will not have an impact on the agriculture industry.

### **Regulatory Flexibility Analysis**

The rules proposed for readoption with amendments will not impose any reporting, or recordkeeping requirements on small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules proposed for readoption with amendments merely implement the prohibitions against the use of discriminatory statements in employment advertising that are contained in the LAD. Although the rules proposed for readoption with amendments may impact the advertising activities of small businesses that are employers, and media sources that publish employment advertisements, they do not impose new obligations other than those already mandated by existing Federal or State laws. To the extent that the rules proposed for readoption with amendments will clarify the advertising restrictions under existing law, the rules should obviate the need for small businesses to retain professional services to comply with the law. No professional services are required for compliance.

### **Housing Affordability Impact Analysis**

DCR does not anticipate that the rules proposed for readoption with amendments will have any impact on affordable housing in New Jersey or would change the average



costs associated with housing, because the rules proposed for readoption with amendments merely clarify existing State law, and are limited to regulation of employment advertising and banning discriminatory practices therein.

### **Smart Growth Development Impact Analysis**

DCR does not anticipate that the rules proposed for readoption with amendments will have any impact on smart growth or would change housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the rules proposed for readoption with amendments merely clarify existing State law, and are limited to regulation of employment advertising and banning discriminatory practices therein.

**Full text** of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:11.

**Full text** of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

#### SUBCHAPTER 1. GENERAL PROVISIONS

##### 13:11-1.1 Employment advertising generally

(a) It shall be a violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and more particularly, N.J.S.A. 10:5-[12(a), (b), (c) and (e)] **12.a, .b, .c, and .e**, for any employer, union, or employment agency, or any newspaper or other publication published or circulated within this State to print, publish, post, or circulate, or to cause to

be printed, published, posted, or circulated, any print, electronic, or other advertisement relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs, or any of the terms, conditions, or privileges thereof, which expresses, overtly or subtly, directly or indirectly, any limitation, specification, preference, or discrimination based on race, creed, color, national origin, ancestry, age, marital status, **civil union status**, domestic partnership status, sex, nationality, affectional or sexual orientation, **gender identity or expression**, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States, or any intent to make such limitation, unless based on a bona fide occupational qualification.

(b) The use of any word, term, phrase, or expression [which] **that** tends to influence, persuade or dissuade, encourage or discourage, attract, or repel[,] any person or persons because of race, creed, color, national origin, ancestry, age, marital status, **civil union status**, domestic partnership status, nationality, affectional or sexual orientation, **gender identity or expression**, disability, atypical hereditary cellular or blood trait, genetic information, refusal to submit to a genetic test or to make available the results of a genetic test, or liability for service in the Armed Forces of the United States, or sex shall be considered discriminatory advertising in violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

(c) (No change.)

13:11-1.3 Preferences expressed in [column] **category** heading, [or body of advertisement] **label, or job title**

(a) [It shall be a violation of the Law Against Discrimination for any employer, union or employment agency, or any newspaper or other publication published or circulated within this State to publish, print, post or circulate or cause to be published, printed, posted or circulated any print, electronic or other advertisement relating to employment, employment opportunities, job openings, union membership, apprentice programs, job training programs, or any of the terms, conditions or privileges thereof, the language of which advertisement expresses any limitation, specification, discrimination or preference as to] **No language in a category heading, label, or job title associated with any advertisement related to employment or employment-related opportunities shall express any limitation, specification, discrimination, or preference based on age, sex, affectional or sexual orientation, gender identity or expression, marital status, civil union status, domestic partnership status, race, creed, color, national origin, ancestry, nationality, disability, or liability for service in the Armed Forces of the United States, [or age of any intent to make such preference, specification or discrimination unless sex, affectional or sexual orientation, marital status, domestic partnership status, race, creed, color, national origin, ancestry, nationality, disability, liability for service in the Armed Forces of the United States or age is a bona fide occupational qualification for the particular job advertised] except for category headings, labels, or job titles for advertisements for jobs or employment-related opportunities that meet the bona fide occupational qualification standards set forth in N.J.A.C. 13:11-1.4.**

(b) Whenever a "help wanted" advertisement is to contain any job title or job description

for a position that is not one for which sex is a "bona fide occupational qualification" as defined in [those provisions] **N.J.A.C. 13:11-1.4**, the job title shall be stated in terms that are neutral in terms of sex, unless use of a gender-neutral job title is not practicable.

(c)-(d) (No change.)

[(e) The fact that a term does not appear in the above partial list does not mean that such a term is acceptable.]

#### 13:11-1.4 Bona fide occupational qualification exception; application

(a) For the purposes of [these provisions] **this chapter**, the "bona fide occupational qualification" (**BFOQ**) exception shall include only those vocational qualifications [which] **that** are reasonably necessary to the normal operation of the particular business, enterprise, or apprentice or other training program.

(b) (No change.)

(c) The employer, employment agency, or union has the burden of establishing that race, creed, color, national origin, ancestry, nationality, age, marital status, **civil union status**, affectional or sexual orientation, **gender identity or expression**, domestic partnership status, disability, liability for service in the Armed Forces of the United States, or sex is a bona fide occupational qualification.

(d) The application of the exception is not warranted where based on, for example:

1. Assumptions of the comparative general employment characteristics of persons of a particular race, creed, color, national origin, ancestry, nationality, age, sex, affectional or sexual orientation, **gender identity or expression**, **civil union status**, domestic partnership status, disability, liability for service in the Armed Forces of the

United States, or marital status, such as their turnover rate;

2. (No change.)

3. Customer, client, co-worker or employer [reference] **preference**, or historical usage, tradition, or custom; or

4. (No change.)

(e) In regard to sex, the application of the exception may be warranted where it is necessary for authenticity or genuineness, such as for an actor or actress, or where the job in question necessarily involves intimate personal contact with persons of the opposite sex, **and the employer demonstrates that such contact is an essential function of the job and a central purpose of the employer's enterprise, that clients, patients, or others served would not consent to service by members of the opposite sex, that the legitimate privacy interests of clients, patients, or others served by the employee outweigh the public interest in equal employment opportunity, and that no reasonable alternatives to a gender-based BFOQ are feasible.**

13:11-1.5 Ruling by Division on bona fide occupational qualifications for particular jobs

(a) Any employer, union, employment agency, newspaper, or other publication may make an inquiry of the Division on Civil Rights ([to the Bureau of Policy]at (609) 984-[7091]**3138**, 140 East Front Street, **PO Box 89**, Trenton, New Jersey 08625-0089) as to whether race, creed, color, national origin, ancestry, nationality, age, sex, affectional or sexual orientation, **gender identity or expression**, disability, liability for service in the

Armed Forces of the United States, domestic partnership status, **civil union status**, or marital status is a bona fide occupational qualification for a particular job which they intend to publish, print, or circulate or cause to be published, printed, or circulated. If an inquiry is made with respect to a specific advertisement, the entity making the inquiry shall supply a copy of the advertisement the entity seeks to publish.

(b)-(c)(No change.)

(d) The Division shall maintain records as to each inquiry made pursuant to this [Section] **section**, to include the name, title and address of the caller, a summary of the job and job duties, the basis for the exception claimed and the time, date, identification number and disposition of the inquiry.

(e) A newspaper or other publication shall not be in violation of [these provisions] **this chapter** where it has accepted any specific advertisement in good faith and in reasonable reliance upon the representations of the person placing the advertisement that he or she has obtained from the Division an opinion that there is a bona fide occupational qualification for the specific job advertised together with the identification number of that opinion.

#### 13:11-1.6 Violations

Failure to comply with this [Chapter] **chapter** will constitute a violation of N.J.S.A. 10:5-12.